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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-710

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

—against—

CIVIL AERONAUTICS BOARD,
Respondent,

—and—

AMERICAN AIRLINES, INC., *et al.*,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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—and—

AMERICAN AIRLINES, INC., *et al.*,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Air Line Pilots Association, International ("ALPA") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled action on August 8, 1974.

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at —— U.S. App.D.C. ——, 502 F.2d 453. It is reprinted as Appendix

A in the separate Appendix volume submitted herewith. Order 70-7-114 of the Civil Aeronautics Board ("Board" or "CAB"), approving the airline industry Mutual Aid Pact as amended, is reprinted as Appendix I and is not reported. Order 70-11-110 of the CAB, vacating Order 70-7-114 and remanding for further evidentiary proceedings, reprinted as Appendix J, is not reported. Order 73-110 of the CAB, approving the Mutual Aid Pact as amended, reprinted as Appendix K, is not reported. Earlier orders of the CAB on the Mutual Aid Pact are reprinted as Appendices B through H.

Jurisdiction

The judgment of the Court of Appeals was entered on August 8, 1974. This Court has jurisdiction to review the judgment herein by writ of certiorari under 49 U.S.C. § 1486(f) and 28 U.S.C. § 1254(1).

Questions Presented

(1) Is a multi-carrier plan participated in by nearly all U.S. air carriers and having the following chief attributes:

> Virtually all U.S. air carriers* are members and contribute financially;
>
> Pact payments permit a carrier to bargain with a single union having financial assurance that the acceptance of a strike may be more profitable than continued service;

---

* Excluding Delta, Allegheny, and Southern.

The Pact widens industrial disputes by multicarrier participation beyond the bargaining unit without consent to multicarrier bargaining by the bargaining unit representative;

The Pact has been accompanied by long service interruptions in air transportation;

The Pact requires contributions from all carriers without regard to ability to pay;

It demonstrably depends upon confrontation labor tactics;

It enables the carrier to render such or no service as it may choose irrespective of its certificated obligations;

consistent with national labor policy and public interest as enunciated in the Federal Aviation Act of 1958?

(2) Is a multi-carrier negotiating and anti-strike plan which brings to bear the economic strength of the entire industry in the collective bargaining process on a single air carrier, accompanied by assurance of financial support to the single carrier immediately involved, in an amount which makes the acceptance of a strike more financially rewarding than the settlement of a dispute and which widens the single carrier and labor organization dispute to an industry-wide confrontation, consistent with the national labor policy and the provisions of the Railway Labor Act?

(3) Is a multi-carrier combination and conspiracy to contain or depress labor costs throughout an entire industry consistent with the antitrust laws of the United States or subject to the power of the CAB to exempt from antitrust regulation?

Statutes Involved

The pertinent provisions of the Railway Labor Act, as amended (45 U.S.C. § 151 *et seq.*), the Federal Aviation Act of 1958, as amended (49 U.S.C. § 1301, *et seq.*), the Sherman Act (15 U.S.C. § 1 *et seq.*) and Clayton Act (15 U.S.C. § 12 *et seq.*) are set out as Appendix L.

Statement of the Case

In summary, the Mutual Aid Pact is a multi-carrier Pact having almost industry-wide U.S. airline participation, including Pan American World Airways. Mutual Aid Pact participants have obligated themselves to assessments payable to a carrier struck as a result of a labor dispute with a particular union. As designed under the Pact and applied, the carrier in negotiations is assured in advance that if it is struck a total sum will be received which has turned a losing operation into a profit-making picture during the strike period. Coupled with the selection by the struck carrier of the operation of its most profitable routes and denial of service over monopoly routes generating the least profit, in order to maximize Pact profits, the net effect has been to make acceptance of a total or partial strike more attractive and desirable than a settlement. When, as it has been applied, this is tied to acceptance of a strike during off-peak season the negative incentive to the early settlement of labor disputes is greatly compounded.

The Mutual Aid Pact is based upon the premise of confrontation labor tactics by the infusion of massive working capital. This escalates the single carrier dispute into actual industry-wide confrontation. Although not so

denominated, the industry-wide bargaining and confrontation occurs, without the consent of the single union bargaining with a single carrier. This has had the effect of prolonging labor disputes to the detriment of the traveling public and the employee groups. The payments are exacted without regard to those carriers who have had the greatest number of strikes. No incentive within the arrangement exists to encourage reasonable accommodations and peaceful labor relations. To the contrary, the rewards have gone and are calculated to go to those carriers most prone to confrontation labor tactics. This has been at the direct expense of far weaker carriers such as Pan American whose labor relations have been essentially peaceful.* The consequences to the public interest and the employees' interest in a stable U.S. air carrier system and fulfillment of national labor policy have been most adverse.

As the pilot-representing organization on every Pact carrier but one** and the flight attendant representative on twelve Pact carriers, ALPA opposed CAB approval of the Mutual Aid Pact under Section 412 of the Federal Aviation Act, 49 U.S.C. §1382, which required disapproval of the Pact if adverse to the public interest or in violation of the Railway Labor Act. The CAB in 1973 approved the Pact in current form, by a vote of 3-2, against the recommendation of its administrative law judge who called for disapproval of the latest Pact amendments escalating Pact

---

* Pan American World Airways has not experienced a strike since August 1969 and has received no Pact benefits since that strike. Yet from the beginning of 1969 to the present Pan American has paid out net Pact benefits totalling $22,815,745. In the first three quarters of 1974 alone Pan American has paid out $5,924,654. See discussion, Point I, *infra*.

** American Airlines.

benefits and annual maximum liability of Pact members. (App. 226a).*

Despite the multicarrier impact of Mutual Aid, all bargaining by ALPA-represented employees is conducted by the employees themselves on a single-carrier basis.

Current Mutual Aid Pact and CAB Response

Based on 1969-1970 amendments, the Mutual Aid Pact currently guarantees to any struck carrier member meeting limited criteria fifty percent of its normal air transport operating expenses for shutdown flight operations, during the first fourteen days of the strike, and additional amounts ranging down to thirty-five percent of normal operating expenses throughout the remainder of the strike. (App. 314a). Every Pact member contributes on the basis of (a) windfall revenue based on a contributor's increased revenue because of the strike and (b) supplemental payments in proportion of the contributor's air transport operating revenue for the prior year to the total revenue for all members, up to a maximum annual supplemental payment liability for each member of one percent of the prior year's operating revenue. There is no provision in the Pact for exempting any member from liability if required by finan-

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* "App." references herein are to the separate Appendix volume. "Tr." references are to transcripts of the proceedings held before the Hearing Examiners (Administrative Law Judges) before the CAB and reproduced with pagination unchanged from the original in the volumes entitled "Exhibits to Joint Appendix," filed in the Court of Appeals. "Ex." refers to the exhibits introduced into evidence by ALPA or the Carrier or Trunk Carrier parties, also reproduced in the "Exhibits to Joint Appendix" volume. References designated "I" are to the 1968 evidentiary hearing; references designated "II" are to the 1971 evidentiary hearing.

cial considerations and a member may withdraw only on a year's written notice. (App. 320a).

The record before the Board demonstrated that these high level of Pact benefits fortified struck carriers' resistance to union demands without leading to any moderation of the demands, thus unnecessarily prolonging labor disputes to the detriment of the public interest in air service. The record also demonstrated that high level of Pact benefits created a strong incentive for struck carrier to prolong a strike for the short term benefits, particularly where the carrier is operating at a loss.* The one percent supplemental payment liability represented a serious financial drain on weak air carriers to the benefit of the financially strong. Payments have gone in large measure irrespective of a carrier's abrasive and disruptive labor policy. See discussion, Point I, *infra*.

Despite these clear defects in the amended Mutual Aid Pact system, the Board's 3-2 majority refused to disapprove the amended Pact. The Board held that the public's interest in avoiding prolonged strikes because of carrier strike profits was not an "appropriate issue," but that the proper issue was "reasonableness" of labor settlements.

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* This is precisely what happened in a flight attendant strike against TWA in November-December 1973. At that time *Honolulu Advertiser*, November 8, 1973 reported the following on the basis of an interview with TWA Board Chairman C. C. Tillinghast: "Oddly, TWA's profits for 1973 will be better off if the strike isn't settled before year end, Tillinghast noted. That's because TWA is receiving income under 'mutual aid' agreements with other airlines. And meanwhile salary, fuel and other expenses have been shut off. Should the strike end now, the mutual-aid income would end and all the expenses would resume. Yet for several weeks, TWA's revenues would be sub-par since reservations fell with the strike news, Tillinghast explained."

The Board then held that U.S. air carriers would not "resist settlement on a reasonable basis. . . ." (App. 234a). With respect to the financial drain of high levels of Pact liability, the Board held that Mutual Aid is a form of insurance and that the "choice of whether to pay what it costs to have such insurance is . . . for the individual carrier to make." (App. 246a). Members Murphy and Minetti, agreeing with Judge Present that the 1969 Pact amendments should be disapproved, stated:

> "The critical point is that under the 1969 amendments a struck carrier's mutual aid benefits can be so generous that it can show an operating profit while its operations are shut down by a strike." (App. 261a).
>
> * * *
>
> "We also agree with the judge—though this in our view is a lesser factor—that the increased liability of participating carriers to pay supplemental benefits under the 1969 amendments poses an unacceptable threat to the financial stability of the paying carriers. As the judge pointed out, the defect of the Agreement's provision for supplemental payments is that it takes no account of the current financial condition of a paying carrier; and, indeed, the bulk of the mutual aid payments since the 1969 amendments took effect have been to otherwise highly profitable carriers from carriers who were currently either losing money or earning less than a reasonable return on investment." (App. 264a).

Earlier Limited Forms of the Mutual Aid Pact and CAB Response

The Mutual Aid Pact began as a highly limited arrangement and has been gradually broadened to increase the pressure on airline unions with continued acquiescence by

the CAB. The original Pact had only six members* and in essence provided that in the event of strikes seeking settlements in excess of or opposed to presidential emergency board recommendation, called before exhaustion of Railway Labor Act procedures, or "otherwise unlawful," a Pact member would receive only windfall payments from the other members. To maximize windfall, the Pact also provided that struck carriers would direct as much traffic as possible to other Pact members. Despite this limited form, however, the plan was clearly an opening wedge in a long-term airline industry labor relations campaign. As later found by the Board's Hearing Examiner,

> ". . . it is evident that one of the motivating factors [for the first Pact] was a dissatisfaction with the operation of the Railway Labor Act in the air transportation industry. The carriers under the leadership of the ATA apparently extensively explored ways and means to rectify the deficiencies which the air carriers believed made it unsuitable for the air transportation industry regardless of its effectiveness in the railroad industry." (App. 82a-83a).

The Board approved this original Mutual Aid Pact under Section 412 of the Federal Aviation Act on the theory that the Pact would promote "freedom from industrial strife" in the airline industry. (App. 10a). The Board disapproved the traffic referral clause intended to maximize windfall payments, but otherwise approved the Pact against antitrust attack and held that its "order of approval would grant immunity from the antitrust laws." (App. 11a-12a).

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* American Airlines, Capital Airlines, Eastern Airlines, Pan American World Airways, Trans World Airlines, United Air Lines.

Thereafter the carriers began their program of amending and broadening the Mutual Aid Pact. In amendments from 1959 through 1962 the Pact was made applicable to almost all strikes against a Pact member. (App. 84a). Four additional carriers (National, Braniff, Northwest, Continental) joined the Pact, extending membership to ten airlines carrying approximately ninety percent of all trunkline traffic in 1959 (App. 43a), and the Pact was continued in effect on an indefinite basis with limited withdrawal rights. Thereafter in 1962 the Pact was again amended to provide for the first supplemental payments feature, which guaranteed that a carrier member would receive twenty-five percent of its normal air transport operating expenses for shutdown flight operations and which provided a maximum annual supplemental payment liability for each member of one-half of one percent of the prior year's air transport operating revenues. (App. 123a). Over dissents of member Minetti and Vice-Chairman Murphy, the CAB in 1964 approved these amendments for three years, finding the recent past had "not been typical either as to the industry, played with the capacity problem, or labor-management relations, preoccupied with the crew compliment issue. . . ." (App. 48a). This was followed by the 1969-1970 Pact amendments doubling supplemental payment liability and opening the Pact to local service carriers for the first time. The Pact as thus amended was approved by the Board in proceedings under review here.

Court of Appeals Proceedings

ALPA and six other labor organizations sought review of the Board's 1970 and 1973 orders approving the Mutual Aid Pact as amended. Two other unions intervened in the

proceedings on the side of petitioners; the trunkline carrier and local service carrier members of the Mutual Aid Pact intervened on the side of the CAB. The Court of Appeals sustained the Board's orders against ALPA's contentions based on the public interest, Railway Labor Act, and antitrust laws. (App. p. iv).

Reasons for Granting the Writ

The chief attributes of the Mutual Aid Pact have been briefly described. These attributes indicate the public interest, labor policy and antitrust issues raised by the Board majority decisions approving the widened Pact. The Pact permits a certificated air carrier to bargain with a single union on the assurance that acceptance of a strike can be more profitable than continued service, and is adverse to the interest of the public whose benefit is paramount in air regulation. The plan enables the carrier to render such or no service as it may choose irrespective of its certificated obligation, so that the Board's decisions allowing the plan to go forward requires scrutiny at the highest judicial levels. The need for review in the present case is compounded by the demonstrated loss of critical working capital to such carriers as Pan American World Airways and United Air Lines; the financial conditions of these and other carriers suggests that the CAB would have better served the public by regulating the industry as required by law rather than approving the Mutual Aid system with no provision for the finances of unprofitable carriers.

The Court of Appeals below was also in a position to scrutinize the Mutual Aid system with reference to Railway Labor Act obligations, for it is the role of the federal

Courts to interpret and apply the RLA in light of the national labor policy. Unfortunately, the Court declined to exercise its responsibilities with reference to labor policy issues raised by Mutual Aid and approved the Pact as a routine instance of economic self-help, on the basis of a Taft-Hartley decision that on analysis has no bearing here. Correctly viewed, however, the Pact does not represent a self-help effort, but is an industry-wide economic effort in the context of single-carrier bargaining relationships. This type of effort is antithetical to our national labor policy of containing labor disputes to the employer who is bargaining over the disputed contract. In addition, what the Court below missed is the large difference between the Taft-Hartley and Railway Labor Act schemes, for the latter statute regulates an employer's economic weapons always with an eye on certificated carrier obligations. But the effect of the Pact, contrary to RLA limitations, is to enable and encourage a regulated air carrier to accept a strike and render such service as will increase Pact benefits—even by shutting down service on monopoly routes.

The Pact exists as an inter-carrier combination with the purpose of jointly containing labor costs; this violates the Sherman Act on its face, for this kind of multiemployer activity is exempted from the Sherman Act only where the employees affected have agreed on multiemployer bargaining. However, the Board holds that it has power to exempt the Pact from the antitrust laws, contrary to the rulings in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963) and *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973).

These issues, significant as they are, are of double importance by virtue of their industry-wide character. For

nearly the entire United States aviation industry have pooled their resources in the Mutual Aid Pact. The CAB has all but abdicated its regulatory function toward this industry by approving the Pact as amended, and the Court below acquiesced in the Board's failures as if the Mutual Aid Pact were not a case of critical significance for one of the most important industries in the United States. It is respectfully suggested that this Court should rectify the Board's unwillingness to confront the serious dangers posed by Mutual Aid.

ARGUMENT

POINT I

By permitting a carrier to bargain with financial assurance that acceptance of a strike may be more profitable than continued service, widening industrial disputes, allowing an air carrier to render such or no service as it may choose irrespective of its certificated obligations and requiring contributions from all members without regard to ability to pay, the Mutual Aid Pact is adverse to the public interest as defined in the Federal Aviation Act of 1958.

Statutory Framework

Section 412(b) of the Federal Aviation Act of 1958, 49 U.S.C. § 1382, required the Board to disapprove the Mutual Aid Pact and amended Pact if the Pact was found "adverse to the public interest or in violation of this Act. . . ." The public interest objectives mandated by the Aviation Act plainly include the public interest in uninterrupted air

service and the financial well-being of all certificated carriers. See Federal Aviation Act, Section 102, 49 U.S.C. § 1302.

The Adverse Effects of Mutual Aid are Well-Documented

The multiple defects of the Mutual Aid system are well-documented on the record of the case.

1. ***Profit-Making Strikes***

The national labor policy assumes that employee strikes are an available technique for moderating the goals of both parties to a dispute, but the Mutual Aid Pact as amended actually permits a carrier to bargain with a single union with financial assurance that the acceptance of a strike may be more profitable than continued service. The record reveals the remarkable fact as noted by Members Murphy and Minetti that "a struck carrier's mutual aid benefits can be so generous that it can show an operating profit while its operations are shut down by a strike." (App. 261a). As a result, the 1969 amendments produce the actual danger of longer and longer airline strikes. These are the uncontroverted facts found by Judge Present:

> "*National*, although it conducted no operations during the approximately four-month strike by ALEA, with the aid of mutual aid receipts amounting to $27,985,000, earned, during the strike period, net income of $810,000 after $8.4 million in charges for depreciation and amortization.
>
> "*Northwest*, which during the five-month strike by BRAC conducted an average of about 29 percent of its operations, achieved a net profit before income taxes of $17.9 million during the strike period after

deducting $32.8 million in charges for depreciation and amortization. The carrier's mutual aid receipts totaled $47,287,000.

"*TWA* incurred a net loss before income taxes of $879,000 during the two-day strike to which it was subjected in October 1970. That result reflects charges for depreciation and amortization in the amount of $621,000 and mutual aid receipts of $2,452,000. The carrier maintained about 25 percent of its operations during the two days. However TWA estimated that, if it had not suffered the strike, it would have lost $1,687,000 during the two-day strike period, so that the carrier actually gained $808,000 for the period of the strike.

"*Mohawk* received mutual aid for the first quarter of 1971. It conducted no operations during the strike and received no subsidy for that period. Yet, it had a net profit of $29,000 for this quarter after taking into account $1.8 million in depreciation and amortization and $1.4 million in nonoperating expenses." (App. 287a-288a; emphasis added).

Increasing management's capacity to resist union bargaining positions, demonstrated by Pan American's testimony in the 1968 hearing for the pre-1969 Pact, was likewise recognized by the Board as a primary objective of the 1969 amendments. (App. 233a).

The effect of Pact payments on industrial strife is particularly dramatic when a financially weak carrier is involved in a strike. As found by Judge Present:

"It was earlier noted that TWA was financially better off during the two-day strike it incurred in 1970 than if it had fully operated on those days. The really dramatic picture is shown when a weak

> carrier is involved. Thus, for the quarter ended March 31, 1971, the period for which Mohawk received mutual aid, without any operations or subsidy the carrier enjoyed an operating profit of $1,445,000 and a net income after special items of $29,000. In contrast, for the three months ended March 31, 1969, on the basis of its Form 41 reports, the carrier realized from its operations (including $592,000 in subsidy) an operating profit of only $890,000. Furthermore, after special items it suffered a net loss of $421,000." (App. 296a-297a, footnotes omitted).

The Pact as amended has in fact been accompanied by strikes among the longest in airline history. From the Pact amendments through 1972, there were six major strikes on Pact carriers; 119 days, 160 days, 154 days, 115 days, 95 days and 71 days. Northwest's two strikes total 255 days from July 1970—October 1972. Local service carriers Mohawk, Hughes Airwest and Ozark were struck a total of 340 days, a figure previously unheard for regional airlines with the exception of the 1960-1962 Southern-ALPA dispute.* (App. 218a-219a).

2, *Partial Strike-Bound Operations*

Since the Pact has functioned principally in Northwest's interest (App. 298a), and Northwest has likewise pioneered the use of a partial operation and the Pact to maximize its net profit, the 1970 Northwest-BRAC** strike merits special consideration.

Starting in July 1970, Northwest conducted a partial operation throughout the five month strike. At different

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* See *ALPA* v. *Southern Airways, Inc.*, 37 CAB 748 (1962).

** Brotherhood of Railway and Airline Clerks.

times, it sought injunctive relief to prohibit mechanics and pilots from respecting legal BRAC picket lines. In December 1970, the Eighth Circuit actually prohibited pilots from concerted honoring of picket lines. See *Northwest Airlines, Inc.* v. *ALPA*, 442 F. 2d 246 (8th Cir. 1970), *cert. denied*, 404 U.S. 871. This combination of events (1) eliminated effective inter-union assistance while (2) allowing effective inter-carrier assistance through Pact payments to Northwest.

In the absence of any constraint or regulation by the CAB, Northwest itself decided the service which was to be eliminated, in a manner indicating intent to maximize profits and Pact payments, at the expense of the public and its fellow paying carriers, rather than taking action based upon the needs or convenience of the public over its route system.

In pursuing its objectives, Northwest eliminated (1) *virtually all service over its monopoly routes, where no alternative routing was available to the public;* (2) *a large proportion of service over routes which were served by another Pact member from which it would receive windfall and other payments;* and (3) *the smallest proportion of service over routes on which it was competing with airlines which were not Pact members.* These latter were principally long and generally profitable overseas routes also served by foreign carriers. The net effect of this operation was to obtain large Pact benefits, while continuing to obtain revenue from the operations where the competition did not belong to the Pact. (ALPA II, Exs. 1-4). Northwest pioneered in this effort to maximize Pact benefits while continuing to operate. While it did not take ad-

vantage of every opportunity in this regard, it showed how it could be done, thereby providing the model likely to be followed in the future. This pattern of shutdown operations is not consistent with public service requirements.

3. *The Board Responded to the Dangers of Prolonged Industrial Strife in a Manner Totally Adverse to the Public Interest.*

a. Redefinition of the Public Interest; "Reasonable" Settlements

The 1959 Board decision defined the "public interest" in terms of whether the Pact:

> ". . . threatens, by aggravation of labor disputes, to hinder achievement of the objective set forth in Section 102 of the Federal Aviation Act. The public interest which we must guard, though not broadly one of employee welfare, includes attainment of a degree of stability and efficiency in air transportation that freedom from industrial strife will provide." (App. 10a)

As previously discussed, the 1973 Board decision, recognizing the effect of the Pact on negotiations and its intent to increase carrier fortitude in strikes, defined the issue as whether the Pact so shifted bargaining balance "as to create a serious likelihood" of resistance to strike settlements "on a reasonable basis in circumstances where such a settlement was possible", rather than as whether strikes would end more rapidly in the absence of the Pact (App. 233a-234a). In 1973, the Board was willing to accept increased industrial strife if there was no "serious likelihood" that carriers would resist strike settlement on a "reasonable basis"—defined solely by the carrier in its own

self-interest while receiving Pact payments—"in circumstances where such a settlement was possible"—again as defined by the carrier in its own interest while receiving Pact payments.

The Board's redefinition of the issues in terms of "reasonable" labor settlements is an unacceptable claim of authority to decide the terms of labor settlements. Moreover, regardless of Board attempts to define and redefine the standard for determining whether the Pact is "adverse to the public interest" or violates the statute, the prior detailed discussion of the record conclusively demonstrates that the Pact is contrary to the public interest in "freedom from industrial strife", does create a serious likelihood that carriers will resist strike settlements and makes lengthy strikes inevitable.

b. Myth of Promoting Financial Stability

The Board also held that the risk of prolonged strife is outweighed by airline financial stability promoted by inincreased Pact payments. Nonetheless, the 1971 record finally disposed of the myth that increased Pact payments are intended, designed or required to maintain financial stability on struck carriers. Examiner Present found:

> "There is no denying that the higher level of benefits bolsters a struck carrier, but *the Trunkline Carrier Parties have made no showing that an increase in mutual aid benefits was required to maintain the stability of any of the carriers involved in these strikes.* Certainly, the record does not indicate that the 1966 experience established a need for a higher level of payments. As shown in Appendix F, the carriers struck by IAM realized rates of return on investment in 1966 ranging from 7.30 percent by

> Eastern to 21.88 percent by Northwest. National, which did not belong to the mutual aid agreement at the time, enjoyed a rate of return on investment of 15.87 percent. Indeed, it was not until a meeting among pact members held on August 7, 1969, that the proposal was made to raise the 'standard amount'. The record is silent as to the events which prompted this meeting, but the meeting was held during the course of the IBT strike on Western (not then a pact member) and just two days prior to the IBT strike against Pan American." (App. 286a-287a)

The record fully supports these findings, which were not modified by the CAB decision. There was also no effort by the carriers to introduce evidence that increased payments would be likely to be required for financial stability in the future. What the record does show is that these enormous increases were made without any fiscal study (Tr. II 50, 61). Indeed, there was not even any financial analysis of payments which would cover a carrier's actual continuing expenses during a strike with or without a partial operation. Even the expenses to be covered were undefined, except as "the salaries are that you have to pay to your existing employees, the ones you keep on, the rents you have to pay, the interest you have to pay to the banks on your loans, that sort of thing." (Tr. II 56). The results, as set forth above, show that the new payments do not even approximate an attempt to merely cover so called out-of-pocket expenses, *per contra* regularly produce profits for the strike period.

c. Myth of Pressure to Settle Strikes

Rather than confront specific record evidence of profit-making strikes, the Board found that in general carriers are under pressure to settle strikes. But if a carrier is better off by permitting a strike to continue, thus reaping operating profits instead of normal losses, there is no meaningful pressure to settle the strike (See App. 262a). In other respects, too, the Board's effort to discount the danger of profit-making strikes is most unconvincing. Thus, operating profits under the amended Pact would go still higher if the carriers did not take strike losses for "depreciation" of equipment that is not being used and is not substantially depreciating because its useful life is extended by the length of service. The Board's emphasis on "post-strike" losses as discounting strike profits is equally baseless. The Board has never studied the nature or incidence of post-strike losses, and the facts are that many post-strike losses, such as starting-up costs, occur whatever length the strike may take. (See App. 263a).

Finally, it is significant that the Board and Court failed to consider the dangers of profitable exploitation of the Pact through partial strike bound operations, i.e., the 1970 Northwest experience. As the certificate-granting Federal authority, the CAB was and is responsible for preventing the Northwest pattern of evading public obligations for immediate profit. The Board's failure to deal with this issue further indicates that approval of the Pact should be reversed.

4. The Pact Requires Contributions from Members Without Regard to Ability to Pay.

Uncontroverted data demonstrates that the increased supplemental payments required by the 1969 amendments

have been largely received by carriers which did not need support and have been paid by carriers which could not afford to give away large amounts of their working capital. Judge Present properly found:

> "A review of mutual aid data over the life of the agreement again shows that the greatest recipients have been among the relatively more profitable members. Thus, the recipient of the largest amount of mutual aid has by far been Northwest, which has had net receipts of $49,871,000. Yet, in eight of the ten years from 1961 through 1970, Northwest had the highest rate of return on investment of any of the present trunkline pact members. National was the next highest recipient of pact aid, a net of $26,185,000. But, over the period 1961 through 1970, it had the highest rate of return on investment in one year, the second highest in four years, and in only two years was not among the top half of the present group of trunkline members of the Pact." (App. 299a; footnotes omitted.)

Judge Present also found, in the absence of any carrier studies or provision in the Pact taking into account the relative financial conditions of paying and receiving carriers, that the principal contributors have been the weaker airlines and that the contention "that the carriers were able to make the payments called for by the agreement without impairment of their financial condition is hollow." (App. 299a). The 1972 Initial Decision said in part:

> "* * * the highest contributor under the agreement has been United, with net payments in the amount of $28,223,000. United has been in the top half of the ten present trunkline members of the pact only once in terms of rate of return on invest-

ment during the ten-year period reviewed. That was in 1969 when the carrier reached fifth place. The carrier's rate of return on investment over this period did not exceed 9.82 percent and was as low as 0.59 percent. Other evidence of the adverse effect on United of mutual aid is reflected in the carrier's working capital. As of December 31, 1968, United's working capital amounted to $45,994,000. At December 31, 1970, the carrier's working capital totalled $17,520,000. The carrier estimated that if there were no mutual aid agreement its working capital would have been $47,225,000 at December 31, 1970. The next highest payer of mutual aid has been Pan American, in the net amount of $21,846,000. Pan American has been in the top half of the pact members in terms of rate of return on investment, [illegible] in the ten-year period, but since 1963, it has reached the top half only once, fifth place in 1967. The carrier had a negative rate of return on investment in 1969 and a return of only 0.51 percent in 1970." (App. 299a-300a)

Moreover, Pan American has not suffered a strike since a brief five-day work stoppage in August 1969—contradicting carrier allegations that the weakest carriers experience the most strikes. (See App. 262a.) Yet, according to public record Form 41 documents filed with the CAB, Pan American from 1969 through the third quarter of calendar 1974 has distributed Pact payments in the net amount of $22,815,745, including $2,765,029 paid out in the third quarter of 1974 alone. In fact, Pan American's total cash distribution under Mutual Aid for the first three quarters of 1974 alone has been $5,924,654 or approximately fourteen cents per share of common stock outstanding. In return, Pan American has received no Pact benefits since 1969.

The Board sought to sustain the discriminatory impact of the Pact by denominating the Pact as a "form of strike insurance, stating that the choice of paying the costs of this "insurance" is for the carrier to make. On the contrary, the Pact is not a form of insurance. Neither the inception of a strike nor its duration are altogether beyond the control of management. Moreover, the Board, not the carriers, must decide whether the costs of Mutual Aid are not adverse to the public interest. In the present case, the high level of Pact liability coupled with discriminatory impact on carriers with weak finances and peaceful labor relations, required disapproval of the Pact.

POINT II

The Mutual Aid Pact widens the scope of industrial conflict beyond the parties to a dispute and violates limitations on multiemployer action and carrier self-help under the Railway Labor Act.

It is undisputed that the Board was required to disapprove the Mutual Aid Pact if the Pact violates or is inconsistent with the Railway Labor Act, 45 U.S.C. Sec. 151 *et seq.* See Section 401(d)(4), Federal Aviation Act, 49 U.S.C. § 1371. The Board and Court held that it is consistent with the Railway Labor Act for an entire industry to amass its economic strength to fortify the bargaining position of a single struck carrier. These decisions are contrary to established RLA limitations.

The Pact Widens the Scope of Labor Disputes and is Inconsistent with Limitations on Multiemployer Economic Activity Against Employees

The Mutual Aid Pact focuses the economic power of an entire industry against striking employees on a single carrier where all bargaining is conducted on a single-carrier basis, widening the scope of industrial conflict and implicating employers who are not party to the underlying labor dispute. However, national labor policy generally limits the scope of industrial dispute to the employer immediately affected to prevent local or particular disputes from widening into national industry-wide industrial confrontation. It is particularly established that multiemployer economic activity against employees is consistent with national labor policy only where it is a) confined to a multiemployer bargaining unit, and b) protects the multiemployer bargaining group in the face of union action directed at its common front or integrity. *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87 (1957) (*"Buffalo Linen"*); *NLRB* v. *Brown*, 380 U.S. 278 (1965); *New York Mailers' Local 6* v. *NLRB*, 327 F.2d 292 (2d Cir. 1964); *NLRB* v. *Great Atlantic & Pacific Tea Co.*, 340 F.2d 690 (2d Cir. 1965). In no instance may multiemployer actions focus on single-employer bargaining relationships where the employees have refused to consent to multiemployer bargaining.

In *NLRB* v. *Brown*, *supra*, the Court held that a temporary lockout by employer members of a multiemployer bargaining unit in response to a whipsaw strike, when followed by hiring temporary replacements for the strike-lockout period, was not an unfair labor practice, inasmuch as the lockout-replacement combination "was all part and

parcel of the respondents' defensive measure to preserve the multi-employer group in the face of the whipsaw strike." 380 U.S. at 284.

In *NLRB* v. *Great Atlantic & Pacific Tea Co., supra*, the Second Circuit also recognized the limitation on multi-employer action advanced here. There the respondent stores locked out employee members of the Meat Cutters Union in response to a Meat Cutters strike against another store chain. The Court found:

> "[S]ince the Meat Cutters had not, either by word or deed, committed themselves to industry-wide bargaining, the food chains' conduct lost the protective quality which justified the Buffalo Linen lockout . . ." 340 F.2d at 692-693.

Like the multiemployer lockout in *A & P, supra*, the Mutual Aid Pact is an offensive weapon of the carriers for amassing multiemployer strength against employees of a single carrier where no multiemployer bargaining has been established. It is thus inconsistent with the elementary national labor policy confining economic warfare to the parties to the economic dispute. As a tactic for turning a single-carrier brushfire war into an industry-wide conflagration, the Pact should be disapproved under the Railway Labor Act. See also *Kennedy* v. *Long Island R.R.*, 211 F.Supp. 478, 488 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 666 (2d Cir. 1963), *cert. denied*, 375 U.S. 830, where the Court upheld inter-carrier financial assistance in a context where "[m]ulticarrier bargaining of labor demands, referred to as regional and national handling, has been and is (since the Act) the customary method of collective bargaining." 211 F.Supp. at 488. And see *United Trans-*

portation Union v. *Burlington Northern, Inc.*, 325 F.Supp. 1125 (D.D.C. 1971); *Cordova* v. *Bache & Co.*, 321 F.Supp. 600, 607 (S.D.N.Y. 1970).

The Pact Does not Constitute Proper Carrier "Self-Help" in Accordance with the Railway Labor Act.

Under the Railway Labor Act the right of carrier "self-help" is a strictly limited right, to be interpreted in light of the carrier's responsibility to make "reasonable efforts to maintain the public service" during a strike. In *Brotherhood of Railway Clerks* v. *Florida E.C. Ry.*, 384 U.S. 238, 245 (1966), the Court held that a carrier faced with a strike could take responsive economic action in the form of *continuing operations* with replacements, but could only make changes in the collective bargaining agreement of the striking employees if they were "reasonably necessary" to continue the operation. 384 U.S. at 248. It is apparent from the Court's opinion that an employee strike under the Railway Labor Act is not an occasion for unlimited economic warfare, but that any carrier self-help which has the effect of prolonging interruption of regular service is inconsistent with the Railway Labor Act. 384 U.S. at 248, n. 8. This holding is consistent with the comparable concept under the Taft-Hartley Act, where the Court has indicated it is not an unfair labor practice for an employer "to replace . . . striking employees with others in an effort to carry on the business." *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938). Yet, one of the principal effects of the Mutual Aid Pact is to provide economic motivation to Pact carriers in order to enable them to continue a strike until management has achieved objectives which could not otherwise be attained.

The Board and Court held that *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477 (1960), precludes judicial limits on economic warfare under the Railway Labor Act. However, self-help rights under the RLA are much more limited than under Taft-Hartley, because of public service requirements. See *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). Moreover, under the Railway Labor Act it is the role of the Federal Courts to give specific content to the broad provisions and concepts of the Act, "'in the way in which the common law has developed.'" *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570, 577 (1971). Finally, the Board's interpretation of *Insurance Agents* is much too broad, for that case only held that the Board may not find that a union slowdown tactics while negotiations are in progress are per se a refusal to bargain in good faith, 361 U.S. at 489.

Administrative and judicial regulation of economic tactics in fact has not ceased with the *Insurance Agents* case. See, *e.g.*, *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963); *NLRB* v. *Inland Trucking Co.*, 440 F.2d 562 (7th Cir. 1971). See also *American Ship Building Co.* v. *NLRB*, 380 U.S. 318 (1965) (White, *J.*, concurring in the result). Rather, as these cases show, employer economic tactics are carefully limited. The Mutual Aid Pact should also be disapproved as a multicarrier combination against single-carrier bargaining units that broadens industrial disputes and enables struck carriers to avoid any public service operations.

POINT III

As a multicarrier combination to control and depress labor costs, the Mutual Aid Pact violates the antitrust laws and is not exempted from antitrust regulation by CAB approval.

The Mutual Aid Pact is a multicarrier effort to control and depress wages and working conditions on an over-all basis throughout the scheduled airline industry, despite historic single carrier bargaining relationships and agreements in all instances. Indeed, the 1973 Board decision expressly relied upon a finding that the Pact gave the member carriers "a greater measure of influence over labor costs than they would have without the agreement." (App. 251a). This multicarrier course of conduct violates Section 1 of the Sherman Act, 15 U.S.C. § 1. As stated by the Court in *Cordova* v. *Bache & Co.*, 321 F.Supp. 600, 607 (S.D.N.Y. 1970) (emphasis added):

> "[A]n essential prerequisite to the legality of such multi-employer combinations with respect to industry-wide wages or working conditions in the existence or prospect of a joint collective bargaining agreement with the union, which all parties concede to be immune from the antitrust laws. * * * Absent such conditions, however, *a combination of employers to reduce their employees' compensation does not share labor's exemption* [under Section 6 of the Clayton Act, 15 U.S.C. § 17]."

The Mutual Aid Pact is not within the category of carrier activity which the CAB has authority to exempt from the antitrust laws under Section 414 of the Federal Aviation Act, 49 U.S.C. 1384. As a joint carrier effort with respect

to labor relations it is quite distinct from route awards, rate making, mergers and similar matters which are fundamental to the Board's statutory authority for regulation of air transportation. See *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973).

The Court's holding that no consideration should be given to antitrust issues on this proceeding is clear error. The 1969 Initial Decision, part of the proceedings under review in the Court of Appeals, stated as an issue for consideration whether the Agreement will "result in restraints on competition." (App. 167a). The CAB has had full opportunity to consider the antitrust issues implicit in the Pact, and it is the responsibility of the Board, not the airline unions, to marshall evidence with respect to the public interest impact of an inter-carrier agreement. Furthermore, the Pact violates the antitrust laws as a matter of law, leaving no necessity for further development of the record on this issue.

In any event the Court should review the Board's holding, apparently approved by the Court of Appeals, that Board approval of the Mutual Aid Pact "would grant immunity from the antitrust laws." (App. 11). As shown, the Pact is well outside the scope of the Board's exemption power, and it is clearly in the interests of justice to reach this issue at the first opportunity. See *Hughes Tool Co.* v. *Trans World Airlines, Inc., supra.*

CONCLUSION

The issues presented in this case are among the most fundamental aviation, labor law and antitrust issues raised in recent years. They immediately affect an entire industry and will have wide repercussions through American industrial life. For these and the foregoing reasons, it is respectfully urged that the Supreme Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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